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Supreme Court, U.S.
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No. 92-971

In The

Supreme Court of the United States

October Term, 1992

WINSTON J. PERRON,

Petitioner,

versus

BELL MAINTENANCE AND FABRICATORS, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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41 pp

QUESTIONS PRESENTED FOR REVIEW

Bell Maintenance and Fabricators, Inc. submits that the only issues presented for review are whether:

The district court properly dismissed Respondent because Respondent's employee, Lee, was a co-employee of Perron and immune under 33 U.S.C. §933(i);

The district court properly dismissed Respondent because Gulf had taken full authority, responsibility and liability for Lee's negligence, if any.

LIST OF ALL PARTIES

The undersigned counsel of record certifies that the following list of all parties and their counsel.

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and
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United States Fire Insurance Company, intervenor
and
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Bell Maintenance and Fabricators, Inc., Respondent
and
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CITATIONS TO OPINIONS BELOW

Petitioner seeks review of The United States Court of Appeals for the Fifth Circuit's affirmance of the district court rulings. *See*: Petitioner's Appendix A-1 - A-20, reported at 970 F.2d 1409 (5th Cir. 1992). Petitioner's Petition for Rehearing and Re-Hearing *en banc* was denied on September 22, 1992. *See*: Petitioner's Appendix A-38 - A-40, reported at 976 F.2d 732 (5th Cir. 1992). The district court's rulings at issue are the district court's grant of summary judgment on January 24, 1990 (*See:* Petitioner's Appendix A-21 - A-27) and subsequent denial of Petitioner's Motion to Alter or Amend the Judgment on March 18, 1991. *See*: Petitioner's Appendix A-28 - A-37.

JURISDICTION

The district court had jurisdiction pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. §1333.

The Appellate Court had jurisdiction pursuant to 28 U.S.C. §1291.

This Court has jurisdiction over the Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254. The Fifth Circuit denied Rehearing and Rehearing En Banc by order entered September 22, 1992. The Petition was filed within ninety days of entry of the lower court's judgment, 28 U.S.C. §2101(c).

CONCISE STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION IN COURTS BELOW

On March 3, 1985, Winston J. Perron ("Perron") allegedly suffered injuries on a fixed platform owned by Gulf Oil Corporation ("Gulf").

Perron v. Gulf v. Bell

On January 3, 1986, Perron sued Gulf in the United States District Court for the Western District of Louisiana, Lafayette division C.A. 86-0016 "O." Gulf filed a Third Party Demand against Bell Maintenance and Fabricators, Inc. ("Bell" or "Respondent") on April 2, 1987. The district court dismissed Gulf with prejudice because Perron was a borrowed servant of Gulf.

The United States Court of Appeals for the Fifth Circuit affirmed the district court in an unpublished decision on December 26, 1989. *Perron v. Gulf Oil Corp.*, 893 F.2d 344 (5th Cir. 1989). Perron's Petition for Rehearing and Re-Hearing *en banc* was denied on February 4, 1990.

The Supreme Court denied certiorari on June 28, 1990. C.A. No. 89-1725, 110 S.Ct. 3273, 111 L.Ed.2d 782 (1990).

Perron v. Bell

Perron sued Bell in the 25th Judicial District Court for the Parish of Plaquemines on February 28, 1986 for the claim based on the alleged negligence of Mr. Michael Lee. Bell properly removed the suit on January 3, 1990 to

the United States District Court for the Eastern District of Louisiana. U.S. Fire Insurance Company ("U.S. Fire") intervened to recover its Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§901, *et seq.* ("LHWCA") payments. On December 18, 1990, Bell moved for Summary Judgment because Bell is immune under the LHWCA, 33 U.S.C §933(i), by virtue of Lee and Perron's co-employee status, and because Gulf had full control and responsibility for Lee's actions. Perron filed a Memorandum in Opposition, but submitted no affidavits, offered no testimony, and contradicted none of the uncontested facts. The district court granted summary judgment in January 1990. (*See*: Petitioner's Appendix[1] A-21 - A-27). The district court denied Perron's Motion to Alter or Amend the Judgment on March 18, 1991. (*See*: Petitioner's Appendix A-28 - A-37).

The United States Court of Appeals for the Fifth Circuit affirmed the district court on August 21, 1992. (*See*: Petitioner's Appendix A-1 - A-20, reported at 970 F.2d 1409 (5th Cir. 1992)). Petition for Rehearing and Re-Hearing *en banc* was denied on September 22, 1992 by order stating that Rehearing was denied because no member of the panel nor any Judge in regular active service requested polling. (*See*: Petitioner's Appendix A-38 - A-40, reported at 976 F.2d 732 (5th Cir. 1992)).

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[1] For ease of reference, Petitioner's Appendices will be identified by pages A-1 through A-40. Respondent, Bell, has identified its Appendices by pages B-1 through B-7.

II. STATEMENT OF FACTS

Bell does not contest Petitioner's Statement of Facts as far as it goes. However, the statement is incomplete. It is uncontested that Gulf had the sole and exclusive control and direction over Lee and had full authority to discharge Lee. (*See*: Statement of Uncontested Material Facts, Respondent's Appendix B-1 - B-3). Bell had no authority, nor was it allowed to exercise any control, over Lee. Gulf's own employees describe Perron and Lee as co-employees. (*See*: Affidavit of Mr. Jeyusi, Respondent's Appendix B-4 - B-7). These factual points were uncontested by Perron and are conclusive to the issues.

SUMMARY OF ARGUMENT

No Reason to Review

This matter is not appropriate for review by this Court. There is no dispute among the Circuits. This matter involves the application of the Longshore & Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. §§901 *et seq.*, including particularly §933(i). Although this statute has been on the books for many years, Petitioner cannot point to any major legal issue raised by this proceeding having any impact outside of this single case. The only case cited by Petitioner to conflict with the decisions below is a decision from the very same court from which Petitioner seeks relief, the Fifth Circuit; the same Court which affirmed, without dissent, the district court's opinion and which denied rehearing because none of the active judges felt that the court should be polled. This

decision is consistent with existing jurisprudence and this Court should not consider the matter further at this time.

No Reason to Re-Review

Petitioner also seeks to re-review the issue of the borrowed servant defense previously raised in the related litigation in which this Court has already denied certiorari. No purpose can be served by seeking a second effort to reconsider this matter previously refused by this Court.

No Reason to Confuse

Petitioner seeks to confuse two separate and distinctly worded sections of the LHWCA, §§905 and 933. These sections are worded differently and have been amended by the U.S. Congress at different times. Petitioner seeks to have the interpretations and substance of regarding §905 imposed on §933, much like trying to place a square peg in a round hole. Although Bell does not suggest that any Court should ignore any section of Congress' enactments, Petitioner's rough efforts to force interpretation of one section on another are incorrect.

Lower Courts Were Legally Correct

The Fifth Circuit correctly affirmed the District Court's holding that, based on the uncontested facts, Gulf exercised the sole and exclusive control over Lee and Perron who acted as Gulf employees. The comprehensive legislation governing injuries on the Outer Continental Shelf, the LHWCA, precludes tort actions based on the

fault of other workers in the same employ in favor of the certitude of compensation payments to the injured person without regard to fault. The district court recognized the co-employee defense and rightly dismissed the claim based on co-employee fault.

Lower Courts Were Equitably Correct

The district court properly recognized that an employer who has no actual control over, or right to control, an employee because the control was taken by another employer has no liability for that employee's acts. The liability for the acts of an employee arise from the right of actual or authorized control of an employee. Without that right, there is no liability. In this case, it is undisputed that all right to control Lee was taken from Bell by Gulf. The court properly held that the liabilities were also taken from Bell.

ARGUMENT

FACTS

Perron, Gulf's borrowed servant, seeks damages for injuries allegedly suffered in a slip and fall accident on March 3, 1985 on Gulf's production platform. Perron alleged that his injuries were caused by the Respondent's negligence. The undisputed evidence reveals that Michael Lee is Respondent's only connection with the allegations.

Bell filed a Statement of Uncontested Material Facts (Respondent's Appendix B-1 - B-3) in support of its

Motion for Summary Judgment as required by the Uniform Louisiana Local Rules, ULLR 2.09, together with an affidavit of M.K. Jeyusi, the Gulf supervisor of Lee (Respondent's Appendix B-4 - B-7), and deposition excerpts from deposition of James B. Ronquillo. Perron effectively conceded the accuracy of the facts submitted by failing to contest them as required under ULLR 2.10E and by Supreme Court precedents. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Petitioner apparently has now conceded the accuracy of the facts as set forth by Respondent and used by both the district and appellate courts below. Based on the uncontested facts, Gulf exercised all control and direction over Lee. The Uncontested Material Facts provided that

> 10. All control and direction over Bell Maintenance employees such as Lee was exercised by Gulf.

(Respondent's Appendix B-2, §10).

Respondent did not, nor was it allowed to, exercise any control over its employees in the course of their work for Gulf. Gulf provided all training to Lee, the only Respondent employee on the platform, regarding proper safety procedure and responsibilities as gauger and/or lease operator. Lee and Perron were in Gulf's employ, doing Gulf's work on Gulf's platform with Gulf's tools under Gulf's exclusive direction and control. Perron has previously been judicially recognized as a borrowed servant of Gulf. Both Perron and Lee were doing the same work for Gulf.

M.K. Jeyusi's uncontested testimony (Respondent's Appendix B-4) is that he was in charge of the Eugene Island 238 Field in March 1985. He controlled all men working in the Eugene Island 238 Field including Lee and Perron. Based on the uncontested facts, including Jeyusi's affidavit, Gulf used Lee, Perron and other Gulf employees interchangeably as co-employees.

> I could use these operators and Gulf lease operators interchangeably as co-employees to perform services on the various platforms.

(Respondent's Appendix B-7).

Based on the uncontested facts, Gulf required Lee to undergo special Gulf training at the Gulf training facility in New Orleans, Louisiana. Gulf provided all instructions to Lee of his responsibilities and manner of working as a gauger or lease operator on the Gulf platform. Lee was required to attend all Gulf safety meetings.

Gulf had authority to discharge Lee. Neither Lee nor Respondent had any control or veto power over this authority. Furthermore in his capacity as Senior Production Supervisor, Mr. Jeyusi had sole responsibility and authority to approve the continuation of or the return to employment of Lee. All authority over Lee was held by Gulf. It is undisputed that at no time could or did Respondent exercise any control over any of the work activities of Lee. All control and direction over Lee was exercised by Gulf.

Gulf used Lee as its employee or servant and bears the legal responsibility for Lee's fault, if any. Gulf used Petitioner, Perron, in the same capacity. As both Lee and

Perron were employees of Gulf, Perron has no claim against Lee. 33 U.S.C. §933(i).

THERE IS NO REASON TO GRANT A WRIT IN THIS ISOLATED CASE

This matter is not appropriate for review by this Court. There is no dispute among the Circuits. This matter involves the application of the Longshore & Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. §§901 *et seq.*, including particularly §933(i). Although this statute has been on the books for many years, Petitioner cannot point to major legal issue raised by this proceeding having any impact outside of this single case. The only case cited by Petitioner represented to conflict with the decisions below is a decision from the very same court from which Petitioner seeks relief, the Fifth Circuit; the same Court which affirmed, without dissent, the district court's opinion and which denied rehearing because none of the active judges felt that the court should be polled. This decision is consistent with existing jurisprudence and this Court should not consider the matter further at this time.

Respondent submits that there is no reason to grant Perron's Petition for Writ of Certiorari. The considerations governing review on a Writ of Certiorari are set forth in The Rules of the Supreme Court of the United States, Rule 10. The considerations set forth in Rule 10 do not justify grant of Writ of Certiorari in this case. This matter has been reviewed twice by the federal district court judge and twice by the Fifth Circuit panel. Unanimously and consistently, the judges have found the decision proper. There is no dispute amongst the judges

which handled this matter as to the correct application of the law to the facts of this case.

No state court decisions are implicated in this matter as is conceded on the face of the Petition for Writ of Certiorari.

There are no conflicts between any courts, whether federal or state, in applying the law. As is pointed out below, this is an area of little litigation. Petitioner attempts to find some implications in decisions on other matters which might suggest that the lower courts, in this case, might have been mistaken. However, neither Petitioner, nor Respondent, nor the lower courts during the four reviews, have suggested that there is any direct conflict between this decision and any other final decision interpreting the same laws. There are no reported decisions criticizing any of the lower courts' decisions in this matter.

Petitioner has not pointed to any, nor can he point to any, special or important trend or developments in the law implicated in this decision. There is simply no important question of federal law which should be settled by this Court at this time. This decision involves uncontested facts supporting the factual underpinnings of the lower courts' decisions. The legal decision involves a straight application of the LHWCA.

Supreme Court Rule 10 is a restatement of prior Supreme Court Rule 19. This Court has explained the importance of restricting review to cases involving "special and important reasons" for granting Writ of Certiorari.

> This rule, formulated 30 years ago, embodies the criteria, developed ever since the Evearts Act of 1891, by which the court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this court is confined, decisively restricted to the creation of the intermediate courts of appeal and more largely confined by the judiciary act of 1925 . . . special and important reasons imply a reach to a problem beyond the academic or episodic.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, at 73-74, 75 S.Ct. 614, at 616 (1955).

Petitioner's claim is "episodic." Neither Petitioner's, Respondent's, nor the lower courts' reviews reveal any controlling jurisprudence on the particular issue notwithstanding the fact that the statute was enacted in 1959. If there is any misinterpretation, it is a solitary incident which does not justify this court's exercise of its discretionary review. Further, this Court should allow development of this area by the lower courts prior to exercising review in order to develop and explore the ramifications of this interpretation.

Petitioner's request, and review of existing jurisprudence, reveal no conflict or pressing issue to justify further review of this matter in which the lower courts have unanimously agreed on the application of the law.

NO REASON TO RE-REVIEW THE MATTERS ADDRESSED IN PETITIONER'S PRIOR APPLICATION TO THIS COURT

Petitioner also seeks to re-review the issue of the borrowed servant defense previously raised in the related litigation in which this Court has already denied certiorari. No purpose can be served by seeking a second effort to reconsider this matter previously refused by this Court. Perron's suit against Gulf in the United States District Court for the Western District of Louisiana, Lafayette division C.A. 86-0016 "O" was dismissed with prejudice because Perron was a borrowed servant of Gulf. The United States Court of Appeals for the Fifth Circuit affirmed the district court in an unpublished decision on December 26, 1989. *Perron v. Gulf Oil Corp.*, 893 F.2d 344 (5th Cir. 1989), *reh.* and *reh. en banc denied* (5th Cir. Feb. 4, 1990). This Court denied certiorari on June 28, 1990. C.A. No. 89-1725, 110 S.Ct. 3273, 111 L.Ed.2d 782 (1990).

Petitioner now seeks indirect review of this decision by again arguing that *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925 (1984) somehow controls. This is the same argument pressed in Petitioner's 1990 application to this Court. Section II of Petitioner's current brief is simply a resubmission of matters already taken to finality in connection with this incident. In *Perron v. Gulf Oil Corp.*, C.A. No. 89-1725, 110 S.Ct. 3273, 111 L.Ed.2d 782 (1990), Petitioner's Petition for Writ of Certiorari, Section II, raised the same argument and cited *WMATA* for the same propositions as in Petitioner's current Petition. This issue of the application of *WMATA* has now been judicially addressed nine times arising from

this single claim. No further review is necessary or appropriate.

To suggest that Petitioner should now be allowed to have multiple 'bites at the apple' is contrary to the intent of finality of decisions and the intent of certiorari.

NO REASON TO CONFUSE THE VARIOUS SECTIONS OF THE LHWCA TO CORRUPT THE STATUTE

Petitioner seeks to confuse two separate and distinctly worded sections of the LHWCA, §§905 and 933. These sections are worded differently and have been amended by the U.S. Congress at different times. Perron seeks to have the interpretations and substance of regarding §905 imposed on §933, much like trying to place a square peg in a round hole. Although Respondent does not suggest that any Court should ignore any section of Congress' enactments, Petitioner's rough efforts to force interpretation of one section on another are incorrect.

Petitioner attempts to manipulate definitions of terms found in §§904 - 905 to control to other terms found in §933. Had Congress intended to use the same terms in §933 as it used in §§904 - 905, Congress could easily have done so. However, in an effort to provide more uniformity and avoid the technicalities of specific contractual terms, Congress, in §933, used the term "in the same employ." This characterization is broader and encompasses both Perron and Lee who were both employed by Gulf to operate the platform. These two individuals were two of a total of four who served as the full operations crew for this platform's round the clock operation. They

all had the same job – to keep this production platform producing. These four men were all in the same employ. These four men were all part of the employee family intended to be viewed as one unit.

Petitioner's effort to impose a *quid pro quo* where none exists subverts Congress' explicit intent to cover the entire 'employee family' under the LHWCA. *See*: 1959 U.S.C.C.A.N. 2134, quoted in note 5 in the Fifth Circuit decision below, Petitioner's Appendix A-15 - A-16). In fact, the only *quid pro quo* suggested by Congress is the very protection afforded by the lower courts' decisions in this matter. Lee, being part of the 'employee family,' is immunized from suit by his co-employees such as Petitioner. The very purpose of §933 is served by the lower courts' rulings. Nothing in Petitioner's arguments can change the language or purpose of the statute.

THE LOWER COURTS PROPERLY DISMISSED BELL BECAUSE BELL'S EMPLOYEE, LEE, IS A CO-EMPLOYEE OF PERRON AND IMMUNE UNDER 33 U.S.C. §933 (i)

The Fifth Circuit correctly affirmed the District Court's holding that, based on the uncontested facts, Gulf exercised the sole and exclusive control over Lee and Perron who acted as Gulf employees. The comprehensive legislation governing injuries on the Outer Continental Shelf, the LHWCA, precludes tort actions based on the fault of other workers in the same employ in favor of the certitude of compensation payments to the injured person without regard to fault. The district court recognized the

co-employee defense and rightly dismissed the claim based on co-employee fault.

33 U.S.C. §933(i) provides that an employee has no rights beyond compensation when injured by another in the same employ. Section 33(i) of the LHWCA states:

> the right to compensation or benefits under this Act shall be the exclusive remedy to an employee when he is injured . . . by the negligence or wrong of another person or persons in the same employ:

In this section, the U.S. Congress clearly defined the rights of an individual under the LHWCA. The statute defines the rights of the injured party, and is not controlled by the rights or obligations of any other party. Simply put, when an injured party is entitled to compensation, which Petitioner is, that person cannot sue for the negligence of another in the same employ. The lower courts correctly held that, since both Perron and Lee were employees of Gulf working on the same platform, and both were operating the platform, they were in the same employ. Perron has no right, by statute, to sue for the negligence or wrong of Lee.

It is uncontested that Lee is a borrowed employee of Gulf. Petitioner has apparently dropped his suggestions to the contrary. The status of Perron as an employee of Gulf has been litigated all the way to the Supreme Court. *Perron v. Gulf Oil Corp.*, C.A. 86-0016 "O" (W.D. La. 1987), *aff'd.* 893 F.2d 344 (5th Cir. 1989), *reh.* and *reh. en banc denied* (5th Cir. February 4, 1990), *cert. denied*, C.A. No. 89-1725, 110 S.Ct. 3273, 111 L.Ed.2d 782 (1990). Petitioner has admitted that Lee is at least as much an employee of

Gulf as he is. Based on parallel facts which existed in *Perron's own claim against Gulf, Lee is an employee of* Gulf.

The "borrowed employee" doctrine was initially recognized by the Supreme Court in *Standard Oil v. Anderson*, 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480 (1909). This holding has been cited with approval on a number of occasions. *Gaudet v. Exxon*, 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed.2d 414 (1978). Whether a relationship of borrowed servant exists is a matter of law. *Gaudet v. Exxon*, 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed.2d 414 (1978). The borrowed servant status can be evaluated under the test of *Ruiz v. Shell Oil Company*, 413 F.2d 310 (5th Cir. 1969), *see also: Capps v. N.L. Baroid-N.L. Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986); *West v. Kerr-McGee Corporation*, 765 F.2d 526, 530 (5th Cir. 1985); *Gaudet v. Exxon*, 562 F.2d at 355; *Benoit v. Transco Exploration Co.*, 577 F.Supp. 304 (W.D.La. 1983).

Under any of these tests, the district court properly found that Lee was the borrowed servant of Gulf. A cursory review of the factors spelled out in *Ruiz v. Shell Oil Company*, 413 F.2d 310 (5th Cir. 1969) shows Gulf's employer status to Lee. The Fifth Circuit has considered the question of "control" to be the central issue of the borrowed employee status. *Hebron v. Union Oil Company*, 634 F.2d 245 (5th Cir. 1981). As evidenced by the affidavit of M.E. Jeyusi (Respondent's Appendix B-4 – B-7), Gulf had absolute and complete control of Lee's work.

> At no time did Bell Maintenance exercise any control over any of the work activities of Lee or other Bell Maintenance hands while those

> employees were in the Gulf field. All control and direction over Bell Maintenance payroll employees were exercised by Gulf. . . . At no time did Bell Maintenance have any person in the Eugene Island Field with authority. All authority in that field over Lee was executed by me or other similarly situated payroll employees of Gulf.

All testimony of Gulf's control is the same. Gulf had, and exercised, total control. Moreover, all parties understood and agreed with Gulf that Gulf would control Lee and that Lee would work as a Gulf employee. Lee was performing Gulf's work.

> Throughout March 1985, Lee worked solely on Gulf platforms. Lee performed Gulf's work with Gulf's rules, regulations and policies.

(Respondent's Appendix B-5)

> Mike Lee worked exclusively on Gulf platforms throughout March, 1985 and, in fact, from April 1983 through July 1986. Gulf provided all meals, lodging, tools and transportation to Lee.

(Respondent's Appendix B-2, ¶8)

> Gulf had the right to fire Lee.

(Respondent's Appendix B-2, ¶11).

An analysis of the *Ruiz* factors and the collateral effect of the judgment rendered in the litigation commenced in Western District of Louisiana show conclusively that Gulf possessed such authoritative direction and control of Respondent's employee, Lee, that Lee was a borrowed employee of Gulf.

Since both Lee and Perron were employees of Gulf, Petitioner has no action. Petitioner's claim is correctly dismissed. *Fitzgerald v. Compania Naviera La Monlinera,* 394 F.Supp. 402 (E.D.La. 1974); *Sharp v. Elkins,* 616 F.Supp. 1516 (W.D.La. 1985). Perron is receiving full benefits available by law under the LHWCA. Petitioner must accept the restrictions of the LHWCA along with its benefits. Both Perron and Lee were in the same employ, specifically operating the Eugene Island 238 Platform at the direction of Gulf. Both Perron and Lee were doing work which Gulf's employees could do. Just as Perron has been deemed to have been in the employ of Gulf, so too is Lee within the employ of Gulf and thus not subject to liability for his negligence.

Petitioner suggests that *Washington Metropolitan Area Transit Authority v. Johnson,* 467 U.S. 925 (1984) somehow controls this case. As the Fifth Circuit pointed out in *Capps v. N.L. Baroid - N.L. Industries, Inc.,* 784 F.2d 615 (5th Cir. 1986) and *West v. Kerr-McGee Corp.* 765 F.2d 526 (5th Cir. 1985), the borrowed servant doctrine is not repudiated by *WMATA.* Petitioner must be aware of this point as Petitioner based his prior arguments to this Court in the Western District proceedings arising out of this claim on the dissent in *West v. Kerr-McGee.* This argument is no more persuasive this time than it was on appeal below or than it was to the district court. Quite simply, the argument addresses sections other than those argued in this case and is inapplicable to the issues herein.

Petitioner had raised a new case in his Petition for Writ not previously raised to the Fifth Circuit: *Probst v. Southern Stevedoring Company,* 379 F.2d 763 (5th Cir. 1967).

It is incredible to think that the Fifth Circuit's decision in *Perron v. Bell Maintenance*, 970 F.2d 1409 (5th Cir. 1992), *reh.* and *reh. en banc denied*, 976 F.2d 732 (5th Cir. 1992) should somehow be overruled by its prior decision in *Probst*. This Court must assume that the Fifth Circuit consistently applied its own rationales in reaching its affirmance. Moreover, if Petitioner believes that there was some inconsistency, Petitioner failed to raise it before the proper court, the United States Court of Appeals for the Fifth Circuit.

As the Fifth Circuit recognized, the more appropriate decisions for this analysis are *Calder v. Crall*, 726 F.2d 598 (9th Cir. 1984) and *Traywick v. Juhola*, 922 F.2d 786; 1991 U.S. App. LEXIS 1189 (11th Cir. 1991). In *Calder*, Calder's suit was barred by the exclusivity provision of the LHWCA, 33 U.S.C. §933(i) because both Calder and Crall were working at the same Air Force base, even though they were employed by separate entities. In fact, Crall was not even subject to the LHWCA. Nonetheless, the Court looked to the practical reality to find that since both Crall and Calder were working on the same base and were working on the same project, they were "in the same employ." Both Lee and Perron were working on the same platform and on the same project. They were "in the same employ."

In *Traywick*, Traywick was employed by the Fort Rucker Golf Course, while Juhola was a civilian employee of the Department of the Army. Traywick was not an employee of the Department of the Army. The Eleventh Circuit concluded by

> Finding that the exclusivity provision of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C.A. §933(i) (West 1986), bars Traywick's action, we affirm.

(*Traywick*, 922 F.2d at 787)

Both the Ninth and Eleventh Circuits recognize that "in the same employ" as used in 33 U.S.C. §933(i) is to be construed in light of the realities of the work environment. In this case, both Perron and Lee were in fact working "in the same employ" in operating the Gulf platform under Gulf's exclusive and extensive control.

In summary, Perron and Lee are "in the same employ," in the employ of Gulf servicing the Eugene Island production platform. Petitioner's rights are described in the LHWCA as made applicable by the Outer Continental Shelf Lands Act. Petitioner cannot pick and choose from the provisions of the Act. As Perron and Lee were in the same employ as intended by 33 U.S.C. §933(i), Petitioner has no claim for Lee's fault. The lower courts are correct in dismissing this action.

THE LOWER COURTS WERE EQUITABLY CORRECT BECAUSE GULF HAD TAKEN FULL AUTHORITY, RESPONSIBILITY AND LIABILITY FOR LEE'S NEGLIGENCE, IF ANY

The lower courts properly recognized that an employer who has no actual control over, or right to control, an employee because the control was taken by another employer has no liability for that employee's acts. The liability for the acts of an employee arise from the right of actual or authorized control of an employee.

Without that right, there is no liability. In this case, it is undisputed that all right to control Lee was taken from Bell by Gulf. The lower courts properly held that the liabilities were also taken from Bell.

The lower court's judgment should not be reviewed because Gulf has exercised such control over Lee as its borrowed servant that it has adopted all responsibility for Lee's fault. In this context, the "borrowed employee" doctrine was defined by the Supreme Court in *Standard Oil v. Anderson*, 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480 (1909):

> One may be in the general services of another, and, nevertheless with respect to particular work, may be transferred with his own consent or acquiescence to the service of a third person, so that he becomes a servant of that person with all the legal consequences of the new relationship . . .

This holding has been cited with approval and discussed on a number of occasions. *Capps v. N.L. Baroid-N.L. Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986); *West v. Kerr-McGee Corporation*, 765 F.2d 526, 530 (5th Cir. 1985); *Gaudet v. Exxon*, 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed.2d 414 (1978); *Ruiz v. Shell Oil Company*, 413 F.2d 310 (5th Cir. 1969); *Benoit v. Transco Exploration Co.*, 577 F.Supp. 304 (W.D.La. 1983).

The issue of control is central both under the LHWCA and (although not directly pertinent) under Louisiana law. *Hebron v. Union Oil Company*, 634 F.2d 245 (5th Cir. 1981); *Ermert v. Hartford Ins. Co.*, 559 So.2d 467 (La. 1990); *Urbeso v. Bryan*, 1991 La. App. LEXIS 1939 (La.

App. 4th Cir, June 27, 1991). The uncontroverted evidence is that Gulf, and only Gulf, had control of Lee.

M.E. Jeyusi, Gulf's Production supervisor, testified that Gulf controlled Lee's work.

> "My duties included the supervision of all men working in the Eugene Island 238 Field including those employees who were the payroll employees of Bell Maintenance, which group included Michael Wayne Lee; . . . At the onset of his work in the field, Lee, like all Gulf lease operators, was instructed on what he should do on a routine basis while performing his platform assignments. These instructions were provided by me or other payroll employees of Gulf. At no time did Bell Maintenance exercise any control over any of the work activities of Lee or other Bell Maintenance hands while those employees were in the Gulf field. All control and direction over Bell Maintenance payroll employees were exercised by Gulf; . . . At no time did Bell Maintenance have any person in the Eugene Island Field with authority. All authority in that field over Lee was executed by me or other similarly situated payroll employees of Gulf. Lee performed Gulf's work with Gulf's rules, regulations and policies."

(Respondent's Appendix B-4 - B-7).

The Uncontested Material Facts upon which this action is based confirm Gulf's absolute control:

> ¶3. On the day of the alleged incident, Mike Lee was working for a Gulf mechanic, Mr. Herman Marshall.
>
> ¶5. Other than the direct supervision of Mike Lee by Herman Marshall, Gulf exercised the

> same control over Mike Lee as Gulf exercised over Perron.
>
> ¶7. Mike Lee received instructions as to his responsibility as gauger and/or lease operator from Gulf.
>
> ¶8. Mr. Lee's work was evaluated by and the decision to retain him as an employee on the platform was made by Gulf's supervisor, Mr. M.K. Jeyusi. Mike Lee worked exclusively on Gulf platforms throughout March, 1985 and, in fact, from April 1983 through July 1986. Gulf provided all meals, lodging, tools and transportation to Lee.
>
> ¶10. All control and direction over Respondent Maintenance employees such as Lee was exercised by Gulf.
>
> ¶11. Gulf had the authority to discharge Lee. Lee's responsibilities were essentially the same as those of Gulf employees in the same position. Respondent did not nor was it allowed to exercise any control over its employee in the course of their work for Gulf.

(Respondent's Appendix B-1 - B-2).

> When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former. This rule is elementary and finds support in a large number of decisions.

Denton v. Yazoo and M.V.R. Company, 284 U.S. 305, 52 S.Ct. 141, 76 L.Ed. 310 (1932). *See also: Standard Oil v. Anderson*, 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480 (1909). Respondent

put Lee at Gulf's disposal and while in the course and scope of Lee's service for Gulf, allegedly caused injury.

When a borrowed servant commits a tort while carrying out the bidding of the borrower, vicarious liability for that tort attaches to the borrower, in this case Gulf, and not to Respondent. *Dellums v. Powell*, 566 F.2d 216 (D.C. Cir. 1977); *Tidewater Grain Co. v. S.S. POINT MANATEE*, 614 F.Supp. 29 (E.D.Pa. 1984); *Krueger v. Mammoth Mountain Ski Area, Inc.*, 873 F.2d 222 (9th Cir. 1989); *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989).

The Fifth Circuit has long held that the law is well established and clear that

> . . . the doctrine of respondeat superior has no application where the employee represents the employer only as to the lawful purpose of the contract but does not represent him in the means by which that purpose is to be accomplished, and the assertion of liability is based on something done or omitted in the use of such means. *Robideaux v. Hebert*, 118 La. 1089, 43 So. 887, 12 L.R.A., N.S., 632. See also in full support: *American National Ins. Co. v. Denke*, Tex.Com.App., 95 S.W.2d 370, 372; *Marquez v. LeBlanc*, La.App., 143 So. 108; *Abate v. Hirdes*, 9 La.App. 688, 121 So. 775; *Gall v. Detroit Journal*, 191 Mich. 405, 158 N.W. 36; 19 A.L.R. 1164; *Skidmore v. Haggard*, Mo.Sup., 110 S.W.2d 726; *Bass v. Kansas City Journal Post*, 347 Mo. 681, 148 S.W.2d 548; *Carter Publications, Inc. v. Davis*, Tex.Civ.App., 68 S.W.2d 640; *Bohanon v. James McClatchy Pub. Co.*, 16 Cal.App.2d 188, 60 P.2d 510; *American Savings Life Ins. Co. v. Riplinger*, 249 Ky. 8, 60 S.W.2d 15; *National Cash Register Co. v. Rider*, Tex.Com.App. 24 S.W.2d 28; *A.L.I.*

Restatement of Law of Agency, page 11, §§2[2] and 250;[3] *Stockwell v. Morris*, 46 Wyo. 1, 22 P.2d 189.

Great American Indemnity Co. v. Fleniken, 134 F.2d 208, 211-212 (5th Cir. 1943) *reh. denied* (1943), *cert. denied*, 63 S.Ct. 1167 (1943).

The undisputed facts set forth by Jeyusi and Ronquillo are that Gulf had sole and exclusive control over Lee's work. The controlling authorities, including *Denton v. Yazoo*, 284 U.S. 305, 525 S.Ct. 141 (1932) and *Standard Oil v. Anderson*, 212 U.S. 215, 29 S.Ct. 252 (1909), clearly hold that liability for negligent acts of an employee is transferred to the borrowing employer where that borrowing employer exercises, as Gulf did in this case, control over the activities of the borrowed servant.

Similar results have obtained in recent decisions. *Tyson v. Litwin Corp.*, 826 F.2d 1255 (3rd Cir. 1987) held that, in order for derivative liability to attach, the lending employer must have borne responsibility for the conduct of its loaned employee. A recent decision clearly spells out the requirements for a borrowing employer to shoulder full responsibility for the acts of a borrowed servant. In *Thille v. E. L. Farmer & Company*, 1991 U.S. Dist. LEXIS 1377 (D.Kan. 1991), the court held that the employer of a truck driver was immune from liability for an accident allegedly caused by the truck driver where the control for the unloading operation had been passed to the party receiving the drill pipe. As in *Thille*, Lee's work was exclusively controlled by Gulf. Lee was performing Gulf's work. Gulf not only had the right to control the details of the work, but, as set forth in the uncontested facts, did actually control that work.

In this case, Gulf, not Respondent, bears responsibility for any fault. This legal conclusion is consistent with and supportive of the general intent of tort law. Gulf, by its extensive control and direction of Lee's work was in the best position to take precautionary or curative action. In contrast, Respondent could exercise no such control. To assess damages against Respondent would not encourage or promote greater safety because Respondent did not have the control necessary to control or direct Gulf in its use of Lee.

The lower courts properly recognized that Perron has no right against Respondent. It is uncontested, as a matter of fact, that Respondent had no actual control over Lee, nor did Respondent have any right to control Lee. In the absence of any actual control or right to control by Respondent, the courts correctly recognized a parallel absence of liability of Respondent.

CONCLUSION

Contrary to Petitioner's arguments, the lower courts correctly applied the law dismissing Petitioner's suit against Respondent.

More importantly, in review of Petitioner's request for certiorari, Petitioner has cited no important legal issues on which courts are in conflict and has suggested no important policy decisions upon which this Court should pass judgment. Petitioner's complaint is an episodic issue on which this Court should await further lower court analysis before addressing this area.

Petitioner has not cited any dispositive jurisprudence to show that the lower courts erred. The unanimity of the lower courts both in this litigation passing through the United States District Court for the Eastern District of Louisiana as well as the litigation arising in the Western District of Louisiana arising out of the same incident shows that there is no error in the courts' handling of Petitioner's claims.

Respondent respectfully submits that Perron's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Of Counsel:

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APPENDICES

A. Statement of Uncontested Material Facts B-1

B. Affidavit of M.K. Jeyusi B-4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WINSTON J. PERRON	CIVIL ACTION
VERSUS	NUMBER 90-0038
BELL MAINTENANCE AND FABRICATORS, INC.	SECTION "A" (2)

****

STATEMENT OF UNCONTESTED MATERIAL FACT

COMES NOW, Bell Maintenance and Fabricators, Inc. who submits the following statement of uncontested material fact in support of its Motion for Summary Judgment.

1. Perron is a borrowed servant of Gulf. (See attached Exhibits B, C and D).

2. Mike Lee was the only employee of Bell working on the platform.

3. On the day of the alleged incident, Mike Lee was working for a Gulf mechanic, Mr. Herman Marshall.

4. Mr. Mike Jeyusi was senior production supervisor in charge of the field in March, 1985 at the time of the incident.

5. Other than the direct supervision of Mike Lee by Herman Marshall, Gulf exercised the same control over Mike Lee as Gulf exercised over Perron.

6. Mike Lee received training from Gulf regarding proper safety procedure while working on Gulf platform.

7. Mike Lee received instructions as to his responsibility as gauger and/or lease operator from Gulf.

8. Mr. Lee's work was evaluated by and the decision to retain him as an employee on the platform was made by Gulf's supervisor, Mr. M.K. Jeyusi. Mike Lee worked exclusively on Gulf platforms throughout March, 1985 and, in fact, from April 1983 through July 1986, Gulf provided all meals, lodging, tools and transportation to Lee.

9. The meals, lodging, tools and transportation were the same as those provided to Gulf employees.

10. All control and direction over Bell Maintenance employees such as Lee was exercised by Gulf.

11. Gulf had the authority to discharge Lee. Lee's responsibilities were essentially the same as those of Gulf employees in the same position. Bell did not nor was it allowed to exercise any control over its employee in the course of their work for Gulf.

OF COUNSEL:

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Respectfully submitted,

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ATTORNEYS FOR BELL
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served on counsel for all parties as provided by F.R.C.P. Rule 5, this 18 day of December, 1990.

/s/ James R. Holmes
JAMES R. HOLMES

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF LAFAYETTE

BEFORE ME, the undersigned authority, personally came and appeared M.K. Jeyusi, of lawful age and a resident of the Parish of Lafayette, Louisiana, who after being duly sworn, declared that:

I, M.K. Jeyusi, have personal knowledge of the facts contained herein. I am presently employed by Chevron U.S.A. as Senior Production Supervisor. Prior to the merger of Gulf Oil Corporation and Chevron U.S.A., I held the same position with Gulf since 1981. Presently I have over twenty (20) years of service with Gulf and Chevron.

In my capacity then [initialed MKJ] as Senior Production Supervisor, I was in charge of all Gulf production facilities in the Eugene Island 238 Field including in March 1985. My duties included the supervision of all men working in the Eugene Island 238 Field including those employees who were the payroll employees of Bell Maintenance, which group included Michael Wayne Lee.

Prior to Lee beginning to work in the Eugene Island 238 Field, he was required by Gulf to receive training conducted by Gulf at the Gulf training facility in New Orleans, Louisiana where he was instructed about proper safety procedures while working on platforms operated by Gulf. He also received instructions as to what his responsibilities would be as a gauger or lease operator on the Gulf production platforms located in the Eugene Island Field.

After Lee was brought out to the Eugene Island Field 238 his work was evaluated by me and I made the decision whether or not Lee could continue working for Gulf in this field.

Throughout March 1985, Lee worked solely on Gulf platforms. In this particular field, he ate all of his meals and slept on the H platform also owned and operated by Gulf. All meals and lodging throughout this time period were provided by Gulf without any expense to either Lee or Bell Maintenance. All payroll employees of Gulf were provided the same meals furnished to Lee. All payroll employees of Gulf were provided the same lodging furnished to Lee and other Bell Maintenance payroll employees.

While Lee was employed in the Eugene Island Field, he was required to attend all safety meetings held by Gulf and conducted by either myself or other Gulf personnel.

Gulf provided all tools necessary for Lee to perform his job on the production platforms. Bell Maintenance did not provide any tools whatsoever. Any necessary special tools or equipment were provided by Gulf for the use and benefit of Lee.

Transportation to and from the Eugene Island Field was furnished by Gulf at no charge to either Lee or Bell Maintenance. Generally this transportation was provided through contract services procured by Gulf with Petroleum Helicopters. When necessary, Gulf provided watercraft to transport Lee and other Gulf employees.

While in the field, Gulf provided all transportation to and from work platforms and the housing platform known as platform H. This transportation was either by

helicopter or vessel at no charge to either Lee or Bell Maintenance. This same transportation was provided to other Gulf employees.

At the onset of his work in the field, Lee, like all Gulf lease operators, was instructed on what he should do on a routine basis while performing his platform assignments. These instructions were provided by me or other payroll employees of Gulf. At no time did Bell Maintenance exercise any control over any of the work activities of Lee or other Bell Maintenance hands while those employees were in the Gulf field. All control and direction over Bell Maintenance payroll employees were exercised by Gulf.

As a lease operator, Lee had the same responsibilities as Gulf payroll lease operators and Danos & Curole lease operators.

Throughout the time that Lee was employed in the Eugene Island Field, he was required by Gulf to submit time tickets for approval. These time tickets would be approved by me and would form the basis of the Bell Maintenance invoices submitted to Gulf for payment. The day rates of Bell Maintenance were directly linked to the hourly rates of Lee which rates were necessarily approved by Gulf. Additionally, any increases in pay for Lee had to be approved by myself. Consequently when I, on behalf of Gulf, approved rate increases for Lee the rates charged by Bell Maintenance to Gulf for Lee would also increase. Lee would not receive any hourly increases without prior approval of Gulf.

Gulf had authority to discharge any Bell Maintenance payroll employees from employment in the Eugene Island Field owned and operated by Gulf. Neither Lee

nor Bell Maintenance had any control or veto power over this authority. Furthermore in my capacity as Senior Production Supervisor, it was my responsibility and authority to approve the continuation of or the return to employment of any Bell Maintenance employees in the Eugene Island Field.

At no time did Bell Maintenance have any person in the Eugene Island Field with authority. All authority in that field over Lee was executed by me or other similarly situated payroll employees of Gulf.

Pursuant to this authority, we required that Lee report daily from the field. He was required to follow established time schedules/work schedules and was subject to performing specific jobs other than his routine job at the request of myself or other Gulf personnel. His responsibilities as a lease operator were essentially the same responsibilities expected of payroll Gulf employees in similar positions.

The job description and responsibilities of Lee and Winston J. Perron were identical. I could use these operators and Gulf lease operators interchangeably as co-employees to perform services on the various platforms.

/s/ M. K. Jeyusi
M. K. Jeyusi

SWORN TO AND SUBSCRIBED BEFORE ME, THIS 23 DAY OF OCTOBER, 1990.

/s/ J.E. McElligott, Jr.
NOTARY PUBLIC